SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO BOSTON BROADCASTERS, INC. BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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First. The thrust of our petition was that the essential ground taken by the court below for sustaining the Commissioner's crassly discriminatory treatment of

WHDH, the so-called "tainted overtures" of the late Mr. Robert B. Choate (Appendix A, pp. 26a-33a), had specifically been rejected by the Commission as a basis for decision in this case, so that reliance thereon by the court below involved an obvious violation of the *Chenery* doctrine (Pet. 5-8, 11, 15-16, 20-23), violation the more indefensible since the Commission's rejection of Chief Justice Stern's basic finding of no impropriety (Pet. 5) had never been judicially reviewed (Pet. 24-26).

Second. Mindful of the restrictions of Rule 24(4), we refrain from either restating or rearguing those matters. But we do not read that Rule as precluding our showing, by way of essential corrective, that the assertion of Boston Broacasters, Inc. (BBI), that "WHDH Has Had Full Judicial Review of Its Arguments" (BBI Br. Op. 11-12), is completely and utterly without foundation.

Third. The fact of the matter—the documented fact of the matter—is that when the court below in this case undertook to sustain the Commission on a ground that that agency specifically declined to espouse, the so-called "tainted overtures", the court of appeals did so without having before it the part of the record that dealt with the late Mr. Choate's two non-private luncheons in public dining rooms a year apart. Not only that, but the Commission refused to refile the record made before Judge Stern containing the evidence dealing with the Choate matter and the portion of the record made before Examiner Sharfman containing evidence on the effect of Choate's death; not only that, but the court below refused to direct the Commission to file this record; not only that, but the court below

refused to permit either WHDH or Greater Boston (presently petitioner in No. 1716) to file any briefs with respect to the Choate portion of the record.

Otherwise stated, the court below not only affirmed the Commission by disregarding the *Chenery* rule, it has affirmed the Commission, not by considering "the whole record" (*Universal Camera Corp.* v. *NLRB,* 340 U.S. 474), but by considering no record at all in support of its primary ground of decision.

In order not to lengthen unduly the body of the present memorandum, we document in an Appendix hereto the essentials of the foregoing paragraph, and we have lodged with the Clerk the text of the several papers from which that documentation is drawn.

Fourth. In view of that documented demonstration, it will become apparent that BBI's argument by epithet—"guilty of tampering with the administrative process" (BBI Br. Op. 5); "improper *ex parte* contacts" (*Id.* 19)—exposes itself as the usual last resort of a litigant whose case is weak on facts and law alike.

CONCLUSION

This case involves grossly arbitrary agency action on the part of the Commission, compounded by a palpable violation of the *Chenery* principle by the reviewing court. The latter violation has been further compounded, as we have just shown, by the reaching of essential conclusions drawn not from a record following argument—for a motion to send for the pertinent record and the right to brief that issue were both denied—but drawn instead out of thin air from materials of spontaneous generation.

This Court should not permit to pass by on the other side such utter disregard of hitherto established standards of judicial review.

Respectfully submitted,

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June 1, 1971

APPENDIX

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1. *Identification of Docket Numbers in the Court Below:* The decision reported at 334 F.2d 552, which remanded the case to the Commission for consideration of the effect of Mr. Choate's death, dealt with Nos. 17785 and 17788, the appeals respectively by Greater Boston Television Corp., now Petitioner in No. 1716 (Great Boston I), and WHDH from the September 1962 decision reinstating the latter's construction permit (33 FCC 449 and 537). In the same decision, WHDH was granted a license.

The decision now sought to be reviewed involved originally three appeals from the Commission's 1969 decisions, which denied renewal of license to WHDH and awarded a construction permit to Boston Broadcasters (16 FCC 2d 1; 17 FCC 2d 856), as follows: No. 23,154, appeal by Charles River (now petitioner here in No. 1708, this Term); No. 23,159, appeal by WHDH (this petitioner, in No. 1622); and No. 23,172, appeal by Greater Boston TV Co., Inc. (Greater Boston II).

2. *Commission's Refusal to File Record Containing Choate Materials:* On December 30, 1969, counsel for WHDH requested the Commission's Assistant General Counsel in charge of litigation to transmit to the court below all of the record made before Examiner Sharfman (which includes the evidence bearing on the effect of Choate's death). (Item A in listing below). On January 2, 1970, this request was refused (Item B). On January 6, 1970, counsel for WHDH repeated this request, invoking Rule 17(b), F.R.App.P., and particularly relying on the "request of a party" clause of that Rule (Item C). No further action was taken by the Commission on that request.

3. *Sua Sponte Consolidation:* Notwithstanding the fact that the record relating to the subject matter of cases 17785 and 17788 below, the portion of the renewal record relating to the effect of Choate's death, were not on file with the court of appeals, Wright, Circuit Judge, in Chambers, on February 20, 1970, ordered, *sua sponte,* the consolidation

of those two cases with cases 23,154, 23,159, and 23,172, "which are presently set for argument at 2:00 p.m., Friday, March 6, 1970" (Item D). Thereafter, largely because of the illness of counsel, argument was postponed until May 25, 1970.

4. *Motion to Sever:* WHDH, presently petitioner in No. 1622 here, and Greater Boston, presently petitioner in No. 1716 here, moved below on March 20, 1970 to sever the Choate cases, Nos. 17785 and 17788, from the latter appeals, Nos. 23154, 23159 and 23172 (Item E).

This motion recited in ¶ 7 the Commission's failure to respond to the court of appeals' remand of April 16, 1964 (334 F.2d 552) in cases 17785 and 17788, as well as the Commission's failure to file any of the evidence taken with respect to that remand issue.

The motion called attention of the court to the fact that the record in these cases was not before it, and that the remand issue therein had not been briefed. ¶ 7 reads:

> "7. Other than lodging with this Court copies of its January 23 and May 20 Decisions, the Commission has made no response to this Court's April 16, 1964 Remand in Cases 17,785 and 17,788. The Commission has not refiled the record in Cases 17,785 and 17,788 which the Court returned to it when it made its remand in April 1964, nor has the Commission filed with this Court any of the evidence taken with respect to the remand issue under its Order of May 8, 1965. WHDH, in its appeal from the denial of its application for renewal of license, Case No. 23,159, has not dealt with the question of the effect of Mr. Choate's death upon the demerit assessed by reason of his alleged *ex parte* conduct because of the Commission's explicit reiterated statements that it had not based its denial of the WHDH renewal upon this ground. Charles River, in its appeal, Case No. 23,154, has taken no issue with the Commission's refusal to consider the effect of Mr. Choate's death upon the assessed demerit for his alleged *ex parte* conduct, nor has Greater Boston TV Co., Inc. (Greater Boston II) raised any such point

in its appeal in Case No. 23,172. Neither does any of these appeals raise any issue with respect to whether or not the Commission rightly refused to modify its September 25, 1962 Decision. Consolidation of Case Nos. 17,785 and 17,788 with Case Nos. 23,154, 23,159 and 23,172, therefore, has not served to put before the Court either evidence or argument bearing upon the question remanded by the Court to the Commission in April 1964."

The motion then pointed out that the Choate issue could not be decided without the record and without briefs and argument thereon, as follows:

"8. Resolution of the remand issue in the 1963 appeals (Cases 17,785 and 17,788) can only be achieved by this Court if it has the evidentiary record made thereon before it. We submit, therefore, that it should direct the Commission to file the evidentiary record made pursuant to this Court's remand forthwith so that the Court will be in a position to determine whether the Commission has properly carried out the direction of this Court in its remand order of April 16, 1964 and so that it may make ultimate disposition of the 1963 appeals. It is also submitted that it would be helpful to the Court and fair to the parties therein if they were directed to file memoranda or briefs and present argument, within a short time after the record is before the Court, directed to the question of whether the Commission has initially made 'an appropriate net assay' of the effect of Choate's death upon its September 25, 1962 decision and what ultimate disposition this Court should make of Case Nos. 17,785 and 17,788."

The motion concluded with a prayer for severance because of the inadequacy of the record:

WHEREFORE, since consolidation of the 1963 appeals with the 1969 appeals does not serve to provide an appropriate record on the basis of which the Court can dispose of the issues raised in the earlier appeals and by its April 16, 1964 Remand Order therein, but will serve only to complicate the ultimate resolution of the 1963 appeals by introducing parties who are strangers

and issues which are extraneous to them, it is respectfully prayed that the Court sever Case Nos. 17,785 and 17,788 from Case Nos. 23,154, 23,159 and 23,172.

The Commission opposed (Item F). In ¶ 1 of its response, it asserted that "To consider these cases separately as WHDH now submits will not only provide an artificial division of cases but will unduly prolong their eventual resolution." The Commission then said (¶ 4), "Attached to this Opposition is an index to the earlier record and should the Court determine that the actual docket volumes are necessary the Commission will, of course, lodge them promptly."

On April 20, 1970, however, the court below (Leventhal, Acting Chief Judge, in Chambers) denied the motion to sever (Item G).

5. *Summary:* The foregoing recital, we submit, fully documents the assertion made by us in Point *Third* of the present memorandum,

> "that when the court below in this case undertook to sustain the Commission on a ground that that agency specifically declined to espouse, the so-called 'tainted overtures', the court of appeals did so without having before it the part of the record that dealt with the late Mr. Choate's two non-private luncheons in public dining rooms a year apart. Not only that, but the Commission refused to refile the record made before Judge Stern containing the evidence dealing with the Choate matter and the portion of the record made before Examiner Sharfman containing evidence on the effect of Choate's death; not only that, but the court below refused to direct the Commission to file this record; not only that, but the court below refused to direct the Commission to file this record; not only that, but the court below refused to permit either WHDH or Greater Boston (presently petitioner in No. 1716) to file any briefs with respect to the Choate portion of the record."

SCHEDULE OF PAPERS LODGED WITH THE CLERK

A. Letter, Dempsey (Counsel for WHDH) to Conlin (Assistant General Counsel, FCC), December 30, 1969.

B. Letter, Conlin to Dempsey, January 2, 1970.

C. Letter, Dempsey to Conlin, January 6, 1970.

D. *Sua Sponte* order of consolidation, *per* Wright, Circuit Judge, February 20, 1970.

E. Motion by Greater Boston and WHDH to Sever Case Numbers 17785 and 17788 from Case Numbers 23154, 23159 and 23172, March 20, 1970.

F. FCC's Opposition to Motion to Sever, March 30, 1970.

G. Order denying motion to sever, *per* Leventhal, Acting Chief Judge, April 20, 1970.